

# Law of the Level

Posted at 3:35 PM on June 19, 2009 by Sheppard Mullin

## Branded: Product Placement and Video Games

Video games and feature films have a lot in common. Both tell stories and have exciting visuals and music. Although one is "interactive", recent Blu-ray HD discs are now turning linear films into more immersive, interactive experiences. Rights and talent deals for both have likewise followed a path towards convergence with terms and consideration often being negotiated and drafted the same way. Nowhere is this trend more obvious than the increasing popularity of product placement in enhancing the economic value of video games by making the game play more realistic while providing increased marketing value and good will by allowing the game developer and product owner, generally at no out-of-pocket cost, to reach new audiences.

Product placement often runs the risk of detracting from its habitat by unduly emphasizing the product without an adequate plot hook. It is not uncommon for a critic to remark upon a particularly clumsy product placement in a movie. Games offer an appealing alternative: an immersive environment that may be actually enhanced by the incorporation of a branded product.

The trend toward incorporating brands into video games is a recognition of a the value these brands can bring to a virtual world. Brands normally pop up in games in one of three ways:

- **Branded Entertainment.** The brand is the game. Examples include Bond games (GoldenEye, I knew thee well), Activision's Spiderman games, or Electronic Arts' FIFA and Madden games. Popular brands have a built in audience, which reduces some of the risk in developing the game. Also, the game play may be more engaging since the game's universe is familiar to the player.
- **Product Placement.** Various definitions may be applied, but here product placement will refer to contractual arrangements between a game company (for ease of reference, the "Developer") and an external company (the "Company") for the insertion of the Company's product into the game universe. Examples of this might include a golf club into a golf game or a guitar in a music simulation.
- **Extra-Contractual Use.** Sometimes virtual representations of real items appear without a contract. Typically this occurs in one of two ways: (1) the Developer inserts the item with the view that its incorporation constitutes fair use or does not otherwise constitute an infringing use of the item; (2) users insert the item into the game (e.g. a game mod that replaces Fallout 3's Nuka-Cola with Coca-Cola).

Of these three, let's talk about Product Placement. Since the price of admission is often 0 dollars, this is an opportunity for the Company to be less concerned with the amount of exposure the

product receives and more concerned with how it can incorporate the product into the game in a way that makes gamers pause and think: that's cool. Gamers can be very sensitive to aesthetics and perceived corporate pandering so the wise company will find ways to work with the Developer to incorporate their product into the game in an innovative or intuitive way rather than insist upon restrictive brand guidelines.

As an initial matter, the external company should determine whether a particular game is an appropriate place for the product. For example, a golf club manufacturer may be enthusiastic about its club being placed in a golf game, but it may be less enthusiastic about it being used to bludgeon zombies in a survival horror (though I really cannot see why as such a placement expands the product into the critical zombie apocalypse preparedness market) <sup>[1]</sup> In addition to this general question, there are a few other central issues that should be addressed:

**QUALITY:** Quality refers to how the product will appear inside the game and what characteristics will be attributed to the product. Companies should ask whether the virtual item will be an exact replication, a generic item with branding affixed, or a revamped setting-appropriate manifestation. Often mockups will provide an example of what the item will likely look like (though the mockup will rarely be offered as a guaranteed representation of in-game appearance). Companies with sensitive public images should also ask what the item will be used for in the game. The company should also ask whether the product will be assigned certain ratings or characteristics and how those ratings or characteristics compare to other items of the same type. Finally, the company may wish to condition the product placement on the expected rating of the game or, alternatively, at least insist that the game be rated and properly labeled.

**PLACEMENT:** Where will the item appear? Rather than thinking of the placement in terms of "screen time," which is almost impossible to control in a game, the placement should be viewed in terms of the role the item will play. Perhaps the item will be an unlockable piece of decoration for an avatar, a functional tool that may be equipped, or a piece of virtual detritus that is strewn about to add to the ambiance. Each of these roles will likely effect how and when a player will interact with the company's item. The Company should work with the developer to create a placement that enhances the image of the product without unduly disrupting the flow of the game. This will require flexibility in most cases.

**CONTROL:** Who will have the final say with respect to the product? Programming unique items into games can be time consuming and costly. Removing the item may be extremely difficult or impossible. The logistics of programming therefore require the Developer to maintain significant control over how an item will be implemented into a game. This means the Company's opportunity to influence how the item will appear is during the initial approval process, which occurs prior to the item's incorporation into the game. As a result, all restrictions and obligations should be clearly set forth during that approval process (that way both the Company and the Developer have the chance to determine whether the placement is in their best interests). The company should go into this understanding that gamers often provide their own game enhancements, whether or not authorized by the Developer's click-through terms-of-use, which can put the placed product beyond any meaningful control. That is, of course, the risk or price for reaching out to an untapped gamer demographic.

**DURATION/TERMINATION:** A company should also be aware of the permanency of a product placement. Removing items from a game may be costly or impossible. As a result, the Company should expect injunctive rights to be hard to obtain. Often the best a Company may walk away with is the right to demand that the item be left out of future releases of the game or the right to demand a patch to the game to remove the item as soon as it is commercially reasonable. A liquidated damages provision may be an appropriate solution in some cases, as it provides the Company with a clear option for recovery while protecting the Developer from the risk of a costly patch that may result in them passing on the product placement.

External companies should view product placement as a partnership with the game developer. A well placed item enhances a game's environment, which improves the game play experience. Companies that are flexible in their negotiations and encourage creativity in the placement will find new and interesting opportunities to put their products in front of a typically hard to reach gamer demographic.

[1] TANGENT. Think about the advertising possibilities here: "GolfCo Clubs are a PREFERRED zombie bludgeon device." "Buy now and receive free Virus-X vaccination!" "GolfCo Clubs: Great Score Today, Protection From Undead Hordes Tomorrow!"

Authored By:  
[Shawn Foust](#) (GamerTag: OMG SRSLY)  
(310) 228-3724  
[sfoust@sheppardmullin.com](mailto:sfoust@sheppardmullin.com)

[Edwin Komen](#)  
(202) 772-5328  
[ekomen@sheppardmullin.com](mailto:ekomen@sheppardmullin.com)